SUPREME COURT OF THE UNITED STATES.

No. 232.

THOMAS C. ROCKHILL & AL., PLAINTIFFS,

vs.

ROBERT HANNA & AL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT, U. S., FOR THE DISTRICT OF INDIANA.

Pleas of the circuit court of the United States, for the seventh judicial circuit and district of Indiana, begun and holden at Indianapolis, in said district, before the honorable John McLean, one of the justices of the Supreme Court of the United States, and the honorable Elisha M. Huntington, district judge of the United States, for the district of Indiana, on the thirty-first day of May, in the year of our Lord one thousand eight hundred and fifty-one.

THOMAS C. ROCKHILL, Wade T. Smith, and William P. Rockhill,
vs.
ROBERT HANNA, Asa B. Strong, Edward Heizer, Aaron Aldridge, Robert B. Hanna, David Shields, Thomas Johnson, Jeremiah Johnson, and George Bruce.
} Debt—on marshal's bond.

Come now on this day the parties by counsel, and file the following certificate, for the Supreme Court, of the division of opinion of the judges of this court, to wit, in these words:

"The plaintiffs sued the defendants in an action of debt on the official bond of Hanna as marshal of Indiana. There are several breaches assigned in the declaration, and several pleas and issues in law and of fact; but for the purpose of enabling the parties to obtain the opinion of the Supreme Court of the United States on a question of law, on which it is hereby certified the judges of this court are divided in opinion, it is agreed as follows, viz:

"That there were judgments in this court of equal date, to wit, the

19th November, 1838, against the same defendant, John Allen; one in favor of the plaintiffs, for nine hundred fifty-seven dollars and twenty-seven cents and costs; one in favor of Price, Newland and Price, for one thousand ninety-three dollars and fifty-two cents and costs; and one in favor of Siter, Price, Price and Cook, for three thousand fifty six dollars and seventy-one cents and costs. On the fifth of March, 1839, writs of scire facias were issued in the two latter cases, which went into the hands of defendant Hanna, the marshal. On the eighth day of March, 1839, these writs were returned with an endorsement on each, that he had levied them on certain lands as the property of said Allen. No further step, by advertising or otherwise, was taken upon this levy till the sixteenth day of May, A. D. 1844, when, without scire facias, affidavit, or order of court, the plaintiffs, in the said two last named judgments, took out writs of venditioni exponas, and put them in the hands of the defendant Hanna, marshal, to be executed.

"The plaintiffs in this suit, on the seventh February, 1839, took out a ca. sa. on their judgment, upon which Allen was imprisoned, and continued in the prison bounds till the passage of the act of the general assembly of Indiana of the 13th January, 1842, entitled 'an act to abolish imprisonment for debt;' by virtue whereof he was released from imprisonment. And thereupon, on affidavit and motion to this court, the said plaintiffs were permitted by said court to sue out a writ of fieri facias on their said judgment.

"That in pursuance thereof, on the thirtieth March, 1844, the plaintiffs sued out their said writ of fieri facias, which, on the first of April, 1844, was placed in the hands of said defendant Hanna, marshal, to be executed. That on the twelfth day of April, 1844, said Hanna, marshal, &c., levied the last mentioned execution on the same identical land so previously levied on in 1839, in manner aforesaid, and advertised the same for sale according to law, in virtue of the execution, in favor of said plaintiffs, and which lands were accordingly sold under said last mentioned execution, and struck off to Fletcher and Butler, the attorneys for the other execution plaintiffs, for one thousand three hundred and sixty dollars, the said Hanna, marshal, having received into his hands, the day previous to said sale, writs of venditioni exponas, tested 16th May, 1844, on the said two other judgments.

"That the said Hanna, marshal, &c., made return of all said writs, and asking the direction of this court as to the disposition or distribution of the proceeds of said sale. That this court, upon such submission of the question, directed the whole of the proceeds of said sale to be paid over to the plaintiffs in this suit, notwithstanding said other writs of execution. That thereupon the said purchasers, on affidavit of said Butler, obtained an order of this court setting aside said sale, setting forth, among other things, that the execution, levy, and advertisement under the judgment of the plaintiffs, was a surprise upon the plaintiffs. That Allen, the execution defendant, had conveyed all of said lands to one Balis Coates, before the rendition of either of said judgments. That the affiant knew no circumstance going to impeach

1044.

Coates' title. That the purchase was a hurried thing, intended to protect the interest of the clients of the affiant. That the said attorneys had suspended their first levy by agreement with the execution defendant, he placing in their hands two notes of Coates for one thousand and four dollars each, as part collateral security for said two judgments and another claim. That the notes of Coates were in part consideration of the sale and conveyance by Allen to Coates of the land so levied on by virtue of said three several executions; and that said Fletcher and Butler had not paid over the money on their bid. That this court, upon said affidavit, set aside said sale, and the plaintiffs in this suit forthwith procured the order of this court to allow them to sue out a venditioni exponas upon the said levy, and on the same day, viz., the 31st May, A. D. 1844, they did sue out their said writ of venditioni exponas, and placed it in the hands of said Hanna, marshal, to be executed; and on the same day, but without any order or leave of said court, the said counsel of the other execution plaintiffs, for them, took out of the clerk's office of this court alias writs of venditioni exponas upon their said levy in the other two cases; which several sets of executions were all put into the hands of said Hanna, marshal, on the same day, who proceeded to advertise and sell the said lands under all of said writs; and by his return apportioning the proceeds of said sale, amounting to one thousand and fifty dollars, among the several judgment plaintiffs pro rata, according to the amount of the respective judgments, the plaintiffs in this suit objecting to any apportionment, and claiming the whole proceeds on account of what they considered was a preference established in their favor in consequence of their superior diligence. That said Hanna was notified by the plaintiffs' counsel, prior to *to* the last sale, that they would claim to have the said lands sold on their execution alone, and that however it might be sold, they would claim the proceeds to the amount of their judgment, interest and costs. Upon which statement of facts the question is raised, whether or not the plaintiffs in this suit are entitled to more than their distributive share of the proceeds of said sale; or whether they are not entitled to the whole of said proceeds to the extent of what is justly due on their said judgment; or whether the executions first levied are not entitled to the whole proceeds of the sale; or whether there can be any preference recognised by reason of superior diligence, the judgments being of equal dates and not impeached."

And it is certified to the Supreme Court of the United States, that on said questions this court are divided in opinion.

I, Horace Bassett, clerk of said court, do hereby certify the above and foregoing to be a true and correct copy of record as now in my office.

In testimony whereof I have hereto set my hand, and affixed the seal of said court, at Indianapolis, the 19th day of January, A. D. 1852.

[SEAL.]

HORACE BASSETT, *Clerk.*

Fee $3 50—paid by Morrison and Major, plaintiffs' attorneys.